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## Civil Commitment of Sex Offenders: South Carolina's Sexually Violent Predator Act

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## NOTE

### CIVIL COMMITMENT OF SEX OFFENDERS: SOUTH CAROLINA'S SEXUALLY VIOLENT PREDATOR ACT

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#### I. INTRODUCTION

During the summer of 1998, the South Carolina General Assembly confronted the problem of recidivist sex offenders by passing the Sexually

Violent Predator Act ("SVP Act" or "Act").<sup>1</sup> Modeled after Kansas's SVP Act,<sup>2</sup> South Carolina's SVP Act provides for the involuntary civil commitment of sexually violent predators who are "mentally abnormal and extremely dangerous."<sup>3</sup> Civil commitment is one of the more controversial methods states are using to augment criminal confinement.<sup>4</sup> However, the United States Supreme Court recently upheld the civil commitment of a sexually violent predator under the Kansas SVP Act,<sup>5</sup> paving the way for South Carolina and other states to enact SVP laws.

This Note first places South Carolina's SVP Act in its historical and societal context in Part II. Part III summarizes the Act itself, focusing on its purpose, key definitions, and commitment procedure. Section IV explores likely future challenges to the Act, including pretextual-use challenges, post-commitment treatment challenges, and procedural challenges.

## II. CIVIL COMMITMENT OF SEX OFFENDERS

### A. *The Rise and Fall of Sexual Psychopathy Laws (1930s-1980s)*

SVP legislation originated from the sexual psychopathy laws of the late 1930s.<sup>6</sup> Michigan passed America's first sexual psychopathy law in 1937,<sup>7</sup> responding in large part to media coverage of brutal sex crimes.<sup>8</sup> Similar to SVP acts, sexual psychopathy laws diverted sexual offenders from the correctional system to the mental health system.<sup>9</sup> Once committed, offenders remained in mental institutions until they fully recovered, or until they were

1. S.C. CODE ANN. §§ 44-48-10 to -170 (Law. Co-op. Supp. 1998).

2. KAN. STAT. ANN. §§ 59-29a01 to -29a17 (1994 & Supp. 1998).

3. S.C. CODE ANN. § 44-48-20.

4. This Note does not examine the divisive constitutional issues raised by SVP statutes. For analysis of these issues, see Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419 (1997); Beverly Pearman, Note, *Kansas v. Hendricks: The Supreme Court's Endorsement of Sexually Violent Predator Statutes Unnecessarily Expands State Civil Commitment Power*, 76 N.C.L. REV. 1973 (1998); and Brian J. Pollock, Note, *Kansas v. Hendricks: A Workable Standard for "Mental Illness" or A Push Down the Slippery Slope Toward State Abuse of Civil Commitment?*, 40 ARIZ. L. REV. 319 (1998) (footnote omitted).

5. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

6. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, MENTAL HEALTH MATERIALS CTR., PUB. NO. 98, *PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S*, 831, 853 (1977); see also Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 889, 897 (1995) (surveying the origins of sexual psychopathy and SVP legislation).

7. Blacher, *supra* note 6, at 897 (citing MICH. STAT. ANN. §§ 780.501-.509 (Callaghan 1937) (repealed 1966-68)).

8. See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 6, at 853.

9. See Blacher, *supra* note 6, at 897. SVP acts differ from the sexual psychopathy laws by delaying civil commitment proceedings until after offenders have served their criminal sentence. See *id.* at 910.

determined no longer to be a menace to others.<sup>10</sup> About half of the states had sexual psychopathy laws by the 1960s.<sup>11</sup> Sexual psychopathy laws lost favor with the legal community and particularly with the psychiatrists responsible for the difficult task of predicting when sexual psychopaths ceased to be a danger to others.<sup>12</sup> Consequently, during the 1970s and early 1980s, most of these laws were repealed or otherwise unenforced.<sup>13</sup>

*B. The Emergence and Affirmance of SVP Acts (1980s-1997)*

Civil commitment of sex offenders reemerged in the late 1980s, prompted by three brutal crimes committed by released sex offenders in the State of Washington.<sup>14</sup> Outraged by a system that had failed them, Washington citizens formed a "task force on community protection" that aggressively examined options to traditional punitive methods.<sup>15</sup> Responding to this grass roots campaign in 1990, the Washington Legislature took two steps toward strengthening its sex offender laws. First, Washington increased sentences for sex crimes, created sexual offender registration laws, and loosened procedural rules making it easier to prosecute repeat offenders.<sup>16</sup> Second, to keep those sexual offenders who were already confined from being released, Washington passed an SVP act that civilly committed persons "likely to engage in predatory acts of sexual violence."<sup>17</sup> Recognizing the constitutional tightrope they were walking with this stop-gap approach, Washington beefed up the procedural safeguards for SVP commitment to resemble standards for criminal prosecution. These strengthened procedural protections included trial by jury, determination beyond a reasonable doubt, and unanimous verdicts.<sup>18</sup>

The Kansas Legislature passed the Kansas SVP Act in 1994.<sup>19</sup> Leroy Hendricks became the first person committed under the Kansas Act after serving a ten-year sentence for taking "indecent liberties" with two thirteen-year-old boys.<sup>20</sup> Hendricks appealed his commitment to the Kansas Supreme Court on the following grounds: substantive and procedural due process, ex

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10. *Id.* at 898.

11. *See id.* at 903.

12. *See id.* at 906.

13. *See id.* at 906-07.

14. *See* Barry Siegel, *Locking Up 'Sexual Predators'*, L.A. TIMES, May 10, 1990, at A1. Earl Shriner committed the most notorious of these three crimes. Near the end of a full 10-year prison sentence for kidnapping and assaulting two teenage girls, Shriner wrote letters and made drawings of an elaborate mobile torture chamber for molesting and killing children. *Id.* Shriner was paroled despite efforts to commit him civilly. *Id.* Two years after his release, Shriner raped a seven-year-old boy, cut off his penis, and abandoned him near death. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. KAN. STAT. ANN. §§ 59-29a01 to -29a17 (1994 & Supp. 1998).

20. *Kansas v. Hendricks*, 521 U.S. 346, 350, 353 (1997).

post facto, equal protection, overbreadth, vagueness, and double jeopardy.<sup>21</sup> The Kansas Supreme Court reversed his commitment on the substantive due process claim, holding that the “mental abnormality” standard in the SVP statute did not meet the prior constitutional standard of “mental illness.”<sup>22</sup> The Kansas Supreme Court majority did not address Hendricks’s ex post facto or double jeopardy claims.<sup>23</sup> The State of Kansas appealed the reversal to the United States Supreme Court. Hendricks filed a cross-petition to reassert his ex post facto and double jeopardy claims.<sup>24</sup>

In a five to four decision, the United States Supreme Court upheld Hendricks’s commitment under the Kansas SVP Act.<sup>25</sup> The Supreme Court took up the following two issues: (1) on direct appeal, whether “mental abnormality” as used in the statute comported with the prior “mental illness” standard,<sup>26</sup> and (2) on cross appeal, whether the Act violated Hendricks’s constitutional rights against double jeopardy and ex post facto legislation.<sup>27</sup> All nine justices agreed on the first issue, finding that “mental abnormality” combined with “future dangerousness” satisfied the established, substantive due process test.<sup>28</sup> The Court split on the second issue, disagreeing on whether involuntary confinement pursuant to Kansas’s SVP Act was punitive and thus violative of “the Constitution’s double jeopardy prohibition or its bar on *ex post facto* lawmaking.”<sup>29</sup>

The majority cited several reasons why the Kansas SVP Act was not punitive. First, the statute’s wording and its placement in the probate code evidenced an intent that it be civil in nature.<sup>30</sup> Second, because commitment did not require a prior, criminal conviction, the purpose of the statute was not to promote retribution or deterrence.<sup>31</sup> Third, the Court found that affirmative restraint, even for an indefinite period, was not punishment in fact.<sup>32</sup> Fourth, the statute’s use of criminal procedure in the commitment process “[did] not transform a civil commitment proceeding into a criminal prosecution.”<sup>33</sup> Fifth,

21. *In re Hendricks*, 912 P.2d 129, 133 (Kan. 1996).

22. *Id.* at 138 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (establishing the two-pronged standard for civil commitment, which requires proof of mental illness and future dangerousness)).

23. *Hendricks*, 521 U.S. at 356.

24. *Id.* at 350.

25. *Id.* at 348, 350.

26. *Id.* at 356.

27. *Id.* at 360-61.

28. *See id.* at 356, 372 (Kennedy, J., concurring), 373 (Breyer, J., dissenting).

29. *Id.* at 360-61; *see also id.* at 372 (Kennedy, J., concurring) (finding the Kansas SVP Act non-punitive); *id.* at 379 (Breyer, J., dissenting) (finding the Kansas SVP Act punitive). The Court laid the burden on Hendricks to provide the “‘clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’” *Id.* at 361 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

30. *Id.* at 361.

31. *Id.* at 361-62.

32. *Id.* at 363.

33. *Id.* at 364-65.

the Kansas SVP Act provided for the minimum constitutional standards of treatment.<sup>34</sup>

The dissent found Hendrick's involuntary commitment under the Kansas SVP Act to be punitive in nature and focused on the statute's lack of treatment requirements.<sup>35</sup> Justice Breyer wrote:

The Act explicitly defers diagnosis, evaluation, and commitment proceedings until a few weeks prior to the "anticipated release" of a previously convicted offender from prison. But why, one might ask, does the Act not commit and require treatment of sex offenders sooner, say, soon after they begin to serve their sentences?<sup>36</sup>

The dissent also noted that Kansas basically had no treatment procedures in place when Hendricks was committed or by the time of the Kansas Supreme Court's decision.<sup>37</sup>

In his majority concurrence, Justice Kennedy first emphasized the Justices' area of agreement. He noted: "It seems the dissent, too, would validate the Kansas statute as to persons who committed the crime after its enactment, and it might even validate the statute as to Hendricks, assuming a reasonable level of treatment."<sup>38</sup> Justice Kennedy went on to warn states against abusing the civil nature of SVP acts, writing: "If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it."<sup>39</sup>

### *C. Practical Challenges to SVP Acts (1997 to present)*

In the wake of *Hendricks*, many more states, including South Carolina, are passing SVP acts,<sup>40</sup> leaving courts, lawyers, and custodial agencies to tackle tough issues that the United States Supreme Court did not address. For example, the Supreme Court of Kansas affirmed the Kansas SVP Act against constitutional challenges not addressed in *Hendricks*, including: procedural due process, equal protection, cruel and unusual punishment, overbreadth, and

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34. *Id.* at 365-68.

35. *Id.* at 384-85 (Breyer, J., dissenting).

36. *Id.* at 385 (Breyer, J., dissenting) (citation omitted).

37. *Id.* at 393 (Breyer, J., dissenting).

38. *Id.* at 372 (Kennedy, J., concurring).

39. *Id.* at 373 (Kennedy, J., concurring).

40. As of February, 1999, 10 states have passed SVP laws: Arizona, California, Florida, Iowa, Kansas, Minnesota, New Jersey, South Carolina, Washington, and Wisconsin. For a comparison of the state SVP acts, see Roxanne Lieb & Scott Matson, *Sexual Predator Commitment Laws in the United States: 1998 Update*, 1998 WASH. ST. INST. FOR PUB. POL'Y.

vagueness grounds.<sup>41</sup> In light of the new SVP acts that infuse criminal procedure into a civil trial, prosecutors must confront practical issues such as the impact of plea negotiations, the admissibility of evidence, and the recalling of victims to testify in the commitment proceeding many years after the criminal trial. Custodial agencies must wrestle with how to house and how to treat the committed persons.<sup>42</sup> Finally, mental health practitioners must testify whether a committed person should be released. This duty includes the difficult task of predicting the future dangerousness of committed persons while they reside in a controlled environment.<sup>43</sup>

### III. SOUTH CAROLINA'S SVP ACT

#### A. Purpose

Codified in the health chapter of the South Carolina Code,<sup>44</sup> the SVP Act's stated purpose is to improve "the existing civil commitment process [that] is inadequate to address the special needs of sexually violent predators and the risks that they present to society."<sup>45</sup> Noting the "nature of the mental conditions from which sexually violent predators suffer and the dangers they present," the South Carolina General Assembly determined "it is necessary to house involuntarily committed sexually violent predators in secure facilities separated from persons involuntarily committed under traditional civil commitment statutes."<sup>46</sup> The purpose provision adds, "[t]he civil commitment of sexually violent predators is not intended to stigmatize the mentally ill community."<sup>47</sup>

#### B. Key Definitions

Under the Act, a "sexually violent predator" is a person who "(a) has been convicted of a *sexually violent offense*; and (b) suffers from a *mental abnormality or personality disorder* that makes the person *likely to engage in acts of sexual violence* if not confined in a secure facility for long-term control,

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41. See *In re Hay*, 953 P.2d 666, 672-76 (Kan. 1998).

42. Minnesota has the oldest and most comprehensive treatment program in the country, housing 130 committed persons as of Summer 1998. See Lieb & Matson, *supra* note 40, at 10.

43. See, e.g., Dennis M. Doren, *Recidivism Base Rates, Predictions of Sex Offender Recidivism, and the "Sexual Predator" Commitment Laws*, 16 BEHAV. SCI. & L. 97, 110 (1998); Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, PSYCHOL., PUB. POL'Y & L., Mar. 1997, at 33, 59-61.

44. Placing the statute in the probate code was one factor the United States Supreme Court cited when determining the Kansas SVP Act evidenced civil rather than criminal intent. See *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

45. S.C. CODE ANN. § 44-48-20 (Law. Co-op. Supp. 1998).

46. *Id.*

47. *Id.*

*care, and treatment.*"<sup>48</sup>

The definition of "sexually violent offense" incorporates fourteen specific criminal sex acts,<sup>49</sup> as well as "any offense for which the judge makes a specific finding on the record that based on the circumstances of the case, the person's offense should be considered a sexually violent offense."<sup>50</sup> "Conviction" of any of the above offenses means a person has:

- (a) pled guilty to, pled nolo contendere to, or been convicted of;
- (b) been adjudicated delinquent as a result of the commission of;
- (c) been charged but determined to be incompetent to stand trial for;
- (d) been found not guilty by reason of insanity of; or
- (e) been found guilty but mentally ill of a sexually violent offense.<sup>51</sup>

The Act defines several other important terms. "'Mental abnormality'

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48. *Id.* § 44-48-30(1) (emphasis added).

49. The 14 criminal sex offenses incorporated in the statute are:

- (a) criminal sexual conduct in the first degree, as provided in Section 16-3-652;
- (b) criminal sexual conduct in the second degree, as provided in Section 16-3-653;
- (c) criminal sexual conduct in the third degree, as provided in Section 16-3-654;
- (d) criminal sexual conduct with minors in the first degree, as provided in Section 16-3-655(1);
- (e) criminal sexual conduct with minors in the second degree, as provided in Section 16-3-655(2) and (3);
- (f) engaging a child for a sexual performance, as provided in Section 16-3-810;
- (g) producing, directing, or promoting sexual performance by a child, as provided in Section 16-3-820;
- (h) assault with intent to commit criminal sexual conduct, as provided in Section 16-3-656;
- (i) incest, as provided in Section 16-15-20;
- (j) buggery, as provided in Section 16-15-120;
- (k) committing or attempting lewd act upon child under sixteen, as provided in Section 16-15-140;
- (l) violations of Article 3, Chapter 15 of Title 16 involving a minor when the violations are felonies;
- (m) accessory before the fact to commit an offense enumerated in this item and as provided for in Section 16-1-40;
- (n) attempt to commit an offense enumerated in this item as provided by Section 16-1-80.

*Id.* § 44-48-30(2)(a)-(n).

50. *Id.* § 44-48-30(2)(o).

51. *Id.* § 44-48-30(6).



means a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses."<sup>52</sup> "Personality disorder," an alternative to "mental abnormality" in the definition of a sexually violent predator, is not defined in the Act.<sup>53</sup> "Likely to engage in acts of sexual violence" means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others."<sup>54</sup>

### C. Commitment Procedure

The commitment procedure begins when a person convicted of a sexually violent offense is scheduled to be released from custody. The agency with jurisdiction<sup>55</sup> must give written notice<sup>56</sup> to the multidisciplinary team<sup>57</sup> and to the Attorney General ninety days prior to the person's release<sup>58</sup> or hearing.<sup>59</sup> The statute requires a person's<sup>60</sup> parole or conditional release to be suspended for ninety days while the person's records are processed for SVP commitment.<sup>61</sup> The person's parole or conditional release is voided if the person is ultimately committed under the statute.<sup>62</sup>

52. *Id.* § 44-48-30(3).

53. A clinical definition of personality disorder will likely be used. Interview with Mark Binkley, General Counsel for the South Carolina Department of Mental Health, in Columbia, S.C. (Sept. 15, 1998).

54. S.C. CODE ANN. § 44-48-30(9) (Law. Co-op. Supp. 1998).

55. "Agency with jurisdiction" means  
that agency which, upon lawful order or authority,  
releases a person serving a sentence or term of  
confinement and includes the South Carolina  
Department of Corrections, the South Carolina  
Department of Probation, Parole, and Pardon  
Services, the Board of Probation, Parole, and Pardon  
Services, the Department of Juvenile Justice, the  
Juvenile Parole Board, and the Department of Mental  
Health.

*Id.* § 44-48-30(5). Agencies and individuals acting in good faith are protected from civil or criminal liability under the Act. *Id.* § 44-48-40(D).

56. The notice must contain "(1) the person's name, identifying factors, anticipated future residence, and offense history; and (2) documentation of institutional adjustment and any treatment received." *Id.* § 44-48-40(C).

57. *See infra* Part III.C.1.

58. *Id.* § 44-48-40(A)(1), (4).

59. *See id.* § 44-48-40(A)(2) (setting the 90-day limit prior to a person's fitness to stand trial hearing); *id.* § 44-48-40(A)(3) (setting the 90-day limit prior to a person's not-guilty-by-reason-of-insanity hearing).

60. The term "person" under the statute means "an individual who is a potential or actual subject of proceedings under [the SVP Act] and includes a child under seventeen years of age." *Id.* § 44-48-30(10).

61. *Id.* § 44-48-40(B).

62. *See id.*

1. *Multidisciplinary Team*<sup>63</sup>

Within thirty days after receiving notice from the agency with jurisdiction, the multidisciplinary team reviews the person's records<sup>64</sup> to determine if the person meets the definition of sexually violent predator.<sup>65</sup> If the multidisciplinary team determines that the person satisfies the definition, it must forward its assessment to the prosecutor's review committee with all records relevant to its assessment.<sup>66</sup>

2. *Prosecutor's Review Committee*<sup>67</sup>

Within thirty days after receiving the assessment and records from the multidisciplinary team, "[t]he prosecutor's review committee shall determine whether or not probable cause exists to believe the person is a sexually violent predator."<sup>68</sup> The Act requires the prosecutor's review committee to consider information that the circuit solicitor who prosecuted the person provided in addition to the records and reports that the multidisciplinary team forwarded to the committee.<sup>69</sup>

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63. The multidisciplinary team is appointed by the Director of the Department of Corrections and consists of:

- (1) a representative from the Department of Corrections;
- (2) a representative from the Department of Probation, Parole, and Pardon Services;
- (3) a representative from the Department of Mental Health who is a trained, qualified mental health clinician with expertise in treating sexually violent offenders;
- (4) a retired judge appointed by the Chief Justice who is eligible for continued judicial service pursuant to Section 2-19-100; and
- (5) the Chief Attorney of the Office of Appellate Defense or his designee.

*Id.* § 44-48-50. The Director of the Department of Corrections or his designee shall be the chairman of the team. *Id.*

64. "These records may include, but are not limited to, the person's criminal offense record, any relevant medical or psychological records, treatment records, and any disciplinary or other records formulated during confinement or supervision." *Id.*

65. *Id.*

66. *Id.*

67. "The Attorney General shall appoint a prosecutor's review committee . . . includ[ing], but not . . . limited to, a member of the staff of the Attorney General, an elected circuit solicitor, and a victim's representative. The Attorney General or his designee shall be the chairman of the committee." *Id.* § 44-48-60.

68. *Id.*

69. *Id.*

### 3. *Attorney General's Petition*

Within thirty days of receiving the probable cause determination from the prosecutor's review committee, "the Attorney General *may* file a petition with the court in the jurisdiction where the person committed the offense."<sup>70</sup> This discretionary language allows the Attorney General to end the commitment procedure by not filing a petition despite a probable cause determination by the prosecutor's review committee. However, if filed the petition must request that the court determine whether or not the person is a sexually violent predator.<sup>71</sup> The Act requires the court to make that determination upon filing of the petition.<sup>72</sup>

### 4. *Probable Cause Hearing and Pre Trial Actions*

Within seventy-two hours after taking the person into custody,<sup>73</sup> the court must hold a probable cause hearing.<sup>74</sup> At the hearing, the court must "(1) verify the detainee's identity; (2) receive evidence and hear argument from the person and the Attorney General; and (3) determine whether probable cause exists to believe that the person is a sexually violent predator."<sup>75</sup> The Act permits the State to "supplement the petition with additional documentary evidence or live testimony."<sup>76</sup> During the probable cause hearing persons have the right (1) to counsel, (2) to present evidence on their behalf, (3) to cross-examine witnesses testifying against them, and (4) to view and duplicate all court-filed petitions and reports.<sup>77</sup> If the court makes a probable cause finding, the person is transferred to a secure facility for an evaluation as to whether the person is a sexually violent predator.<sup>78</sup> The Act provides that "[w]ithin sixty days after the completion of a hearing . . . the court shall conduct a trial."<sup>79</sup> This provision appears to condition a trial upon completion of the probable cause hearing

70. *Id.* § 44-48-70 (emphasis added). "The petition must allege that the person is a sexually violent predator and must state sufficient facts that would support a probable cause allegation." *Id.*

71. *Id.*

72. *Id.* § 44-48-80(A).

73. "If the court determines that probable cause exists to believe that the person is a sexually violent predator, the person must be taken into custody if he is not already confined in a secure facility." *Id.*

74. *Id.* § 44-48-80(B).

75. *Id.*

76. *Id.*

77. *Id.* § 44-48-80(C).

78. *Id.* § 44-48-80(D). "The evaluation must be conducted by a qualified expert approved by the court at the probable cause hearing." *Id.* The next section of the Act provides that persons may retain their own qualified expert to perform the examination. *Id.* § 44-48-90. If indigent, the court shall "assist the person in obtaining the expert to perform an examination or participate in the trial on the person's behalf." *Id.*

79. *Id.* § 44-48-90 (emphasis added).

rather than upon a probable cause determination at the hearing. Assuming this to be a drafting error, the legislature probably intended to require the trial to occur within sixty days of a probable cause determination at the hearing.<sup>80</sup>

As long as the person is not substantially prejudiced, either party may request a continuation of the trial upon showing of good cause, or the court may continue the trial on its own motion in the "due administration of justice."<sup>81</sup>

### 5. *The Commitment Trial*

The commitment trial will be heard by a judge unless the Attorney General or the person requests a jury trial.<sup>82</sup> At the commitment trial, the court or jury must determine beyond a reasonable doubt that the person is a sexually violent predator.<sup>83</sup> A jury verdict must be unanimous.<sup>84</sup> If the court or jury does not so find, the court must order the person's release.<sup>85</sup> If the trial is declared a mistrial, the subsequent trial must be held within ninety days, during which time the person is to be "held at an appropriate secure facility including, but not limited to, a local or regional detention facility until another trial is conducted."<sup>86</sup> The person has the right to appeal an adverse judgment, during which time the person "must be committed to the custody of the Department of Mental Health."<sup>87</sup>

### 6. *Commitment*

If the State carries its burden at trial, the person is to be "committed to the custody of the Department of Mental Health for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."<sup>88</sup> While under its care, the Department of Mental Health (DMH) must keep the person in a secure facility

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80. The sentence following the provision includes the phrase, "[w]ithin thirty days after the determination of probable cause by the court pursuant to Section 44-48-80." *Id.* (emphasis added).

81. *Id.*

82. *Id.* Parties must request a jury trial in writing within 30 days after the probable cause hearing. *Id.*

83. *Id.* § 44-48-100(A).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

and segregate the person from other patients<sup>89</sup> under DMH supervision.<sup>90</sup> Additionally, DMH “may enter into an interagency agreement with the Department of Corrections [(SCDC)] for the control, care, and treatment of these persons.”<sup>91</sup> Under an interagency agreement, SCDC must keep the person “in a secure facility and must, if practical and to the degree possible, be housed and managed separately from offenders in the custody of the Department of Corrections.”<sup>92</sup> Once committed, the person must be treated in accordance with the minimum constitutional standards for adequate treatment.<sup>93</sup> Additionally, the person must have an annual examination of her mental condition.<sup>94</sup> “The annual report must be provided to the court which committed the person pursuant to [the Act], the Attorney General, the solicitor who prosecuted the person, and the multidisciplinary team.”<sup>95</sup>

### 7. Release from Commitment

A person committed under the Act remains committed until a court determines “the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence.”<sup>96</sup> Release proceedings may be initiated by the Director of DMH<sup>97</sup> pursuant to annual review<sup>98</sup> or may be commenced by the

89. The use of “other patients” is inaccurate because the General Assembly amended § 44-22-10(11) of the SVP Act to exclude SVP committed persons from DMHs definition of patient. *Id.* § 44-22-10(11). For a discussion of this amendment, see *infra* notes 114-15 and accompanying text.

90. S.C. CODE ANN. § 44-48-100(A) (Law. Co-op. Supp. 1998).

91. *Id.*

92. *Id.* The precatory “if practical and to the degree possible” language appears to permit a lower standard of care than the person would receive under DMH confinement. See *infra* notes 106-08 and accompanying text for a discussion of this provision.

93. S.C. CODE ANN. § 44-48-170 (“The involuntary detention or commitment of a person pursuant to this chapter shall conform to constitutional requirements for care and treatment.”). For a discussion of required treatment, see *infra* Part IV.B.

94. S.C. CODE ANN. § 44-48-110. The State must provide the examiner unless the person retains his own examiner. *Id.*

95. *Id.* Although this provision of the Act does not articulate who is to provide this report, DMH should be the agency to compile and forward the annual report.

96. *Id.* § 44-48-120.

97. Section 44-48-120 states:

If the Director of the Department of Mental Health determines that the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence, the director shall authorize the person to petition the court for release. . . . The burden of proof is upon the Attorney General to show beyond a reasonable doubt that the petitioner’s mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and, that if released, is likely to commit

offender.<sup>99</sup> Once released from SVP commitment, the person must comply with the sex offender registry statute.<sup>100</sup>

#### IV. FUTURE CHALLENGES TO SOUTH CAROLINA'S SVP ACT

##### A. *Pretext for Punishment Challenges*

Justice Kennedy's frank warning in *Hendricks* invites committed sex offenders to challenge civil commitment as a mere pretext for enhanced punishment.<sup>101</sup> Committed SVP's in South Carolina can raise pretext challenges in several ways. First, South Carolina's SVP Act contains several provisions that appear to undermine the Act's civil purpose—namely, the DMH/SCDC interagency agreement and the amendment that excludes committed SVPs from being defined as “patients.”<sup>102</sup> Second, committed persons may challenge how well state prosecutors integrate the SVP commitment process with regular criminal prosecutions.<sup>103</sup> Finally, committed persons may challenge any “punitive-looking” policies that state agencies may implement pursuant to the Act.<sup>104</sup>

##### 1. *Statutory Provisions as Pretext for Enhanced Punishment*

Several provisions in the SVP Act appear to undermine the South Carolina General Assembly's stated purpose to improve “the existing civil commitment process [which] is inadequate to address the *special needs* of sexually violent predators and the risks they present to society.”<sup>105</sup>

Section 44-48-100 provides in pertinent part:

The control, care, and treatment must be provided at a facility operated by the Department of Mental Health. At all times, a person committed for control, care, and treatment by the Department of Mental Health pursuant to this chapter *must* be kept in a secure facility, and the person *must* be segregated at all times from other patients under the supervision of the

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acts of sexual violence.

*Id.*

98. *Id.* § 44-48-110.

99. *Id.*; see also *id.* § 44-48-130 (limiting one's ability to file frivolous petitions).

100. *Id.* § 44-48-160. For a discussion of the South Carolina Sex Offender Registry Act, see Christy E. Ford, Comment, *Duty to Warn and Public Notification of the Release of Sex Offenders*, 49 S.C. L. REV. 1131 (1998).

101. *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring); see also *supra* notes 19-39 and accompanying text (discussing *Hendricks*).

102. *Infra* Part IV.A.1.

103. *Infra* Part IV.A.2.

104. *Infra* Part IV.A.3.

105. S.C. CODE ANN. § 44-48-20 (emphasis added).

Department of Mental Health. *The Department of Mental Health may enter into an interagency agreement with the Department of Corrections for the control, care, and treatment of these persons.* A person who is in the confinement of the Department of Corrections pursuant to an interagency agreement authorized by this chapter *must* be kept in a secure facility and must, *if practical and to the degree possible*, be housed and managed separately from offenders in the custody of the Department of Corrections.<sup>106</sup>

The “interagency agreement” provision gives rise to the inference that the Act is a pretext for punishment because it authorizes the transfer of control, care, and treatment from DMH to SCDC without any limitation on time or conditions of confinement, other than precatory segregation.<sup>107</sup> It is likely that the legislature included this provision to encourage SCDC and DMH to work together to implement the custodial aspects of the new SVP program.<sup>108</sup> However, the General Assembly arguably went too far by authorizing a shift of the entire scope of DMH authority to SCDC in order to foster this cooperation. The interagency agreement provision itself, regardless of its implementation, appears to undermine the Act’s stated purpose and may unnecessarily raise pretext challenges.

In 1991, the South Carolina General Assembly passed laws outlining the

106. *Id.* § 44-48-100(A) (emphasis added).

107. The purpose provision of the Act supports segregation between SVPs and other mental health patients. Section 44-48-20 states:

The General Assembly also determines that, because of the nature of the mental conditions from which sexually violent predators suffer and the dangers they present, it is necessary to house involuntarily committed sexually violent predators in secure facilities *separated from persons involuntarily committed under traditional civil commitment statutes*. The civil commitment of sexually violent predators is not intended to stigmatize the mentally ill community.

*Id.* § 44-48-20 (emphasis added). Precatory segregation between SVPs and SCDC inmates, while in line with the purpose provision, may raise pretext challenges by treating committed SVPs differently than regular DMH committed persons.

108. DMH and SCDC have entered into an interagency agreement which provides that the Edisto Unit of the Broad River Correctional Institution (a 24-bed facility) will be used to house committed SVPs. Under the agreement, DMH retains all control, care, and treatment aspects inside the Edisto Unit including internal guards, routine maintenance, and sanitation. DMH also arranges for medical, dental, and barber care for the committed persons. SCDC responsibilities under the agreement include: security outside of the Edisto Unit, meals, laundry services, and chaplain services. The agreement does not transfer any care, control, or treatment duties from DMH to SCDC. Interagency Agreement Between the South Carolina Department of Corrections and the South Carolina Department of Mental Health (Apr. 29, 1998) (on file with the *South Carolina Law Review*) [hereinafter Interagency Agreement].

rights of mental health patients.<sup>109</sup> In addition to a provision defining patients' rights generally,<sup>110</sup> these laws recognize a patient's right to (1) the least restrictive care necessary,<sup>111</sup> (2) a treatment plan suited to the individual needs of the patient,<sup>112</sup> and (3) a scheduled review of assessment.<sup>113</sup>

Concurrent with the passage of the SVP Act, the General Assembly amended the state's regular commitment statute to exclude committed SVPs from the statute's definition of patient. The amendment states, "[P]atient' means an individual undergoing treatment in the department [of Mental Health]; however, the term *does not include a person committed to the department pursuant to [the SVP Act]*."<sup>114</sup> A committed SVP who is not afforded the same rights as a DMH patient can argue the amendment is a pretext for enhanced punishment. In one sentence, the amendment succinctly delineates between two groups—committed SVPs without patient rights and all others under DMH care with patient rights. Sex offenders who have served their criminal sentence and are civilly committed under the Act are not afforded the rights of other persons committed under the health code within which the General Assembly placed the Act. Committed SVPs may assert that the denial of these patient rights (such as the right to vote, to marry or divorce, and to a treatment plan suited to each patient's individual needs) exceeds the civil authority of the Act and indicates a pretext for enhanced punishment.

109. See S.C. CODE ANN. §§ 44-22-10 to -220.

110. *Id.* § 44-22-80. This section provides that:

Unless a patient has been adjudicated incompetent, no patient may be denied the right to:

- (1) dispose of property, real and personal;
- (2) execute instruments;
- (3) make purchases;
- (4) enter into contractual relationships;
- (5) hold a driver's license;
- (6) marry or divorce;
- (7) be a qualified elector if otherwise qualified. The county board of voter registration in counties with department facilities reasonably shall assist patients who express a desire to vote to:
  - (a) obtain voter registration forms, applications for absentee ballots, and absentee ballots;
  - (b) comply with other requirements which are a prerequisite for voting;
  - (c) vote by absentee ballot if necessary.

*Id.*

111. *Id.* § 44-22-50(E).

112. *Id.* § 44-22-60(B).

113. *Id.* § 44-22-70.

114. *Id.* § 44-22-10(11) (emphasis added).



The amendment leaves DMH free to define “long-term treatment” of SVPs, bound only by the minimum constitutional standards of treatment.<sup>115</sup> Even though the “long-term treatment” plan DMH implements may pass constitutional scrutiny, the legislature’s decision to exclude SVPs from the definition of “patient” raises an inference of pretext for enhanced punishment.

## 2. *Challenges Against Prosecutors: Charging, Plea Bargaining, and Sentencing of SVPs*

When prosecuting sex offense cases, prosecutors must remain cognizant of possible future SVP commitment.<sup>116</sup> The Act may discourage pleas and

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115. The SVP Act provides that “[t]he involuntary detention or commitment of a person pursuant to this chapter shall conform to constitutional requirements for care and treatment.” *Id.* § 44-48-170.

116. A comprehensive article published by the National District Attorney’s Association addresses this point:

[S]ome prosecutors and judges may be tempted to accord offenders more lenient sentencing consideration premised on the belief that if the offender is truly dangerous, he will subsequently be confined under the SVP law. This perspective is dangerous for several reasons.

First, the vast majority of convicted offenders are not statutorily eligible for SVP treatment because they are not incarcerated and, even among incarcerated offenders, only a small percentage actually satisfy the criteria for filing of a petition. Second, the *Hendricks* decision itself warned against using SVP laws as a backstop for poor plea negotiations and dispositions.

Third, and most importantly, the vast majority of plea negotiations and sentencing decisions are made without adequate knowledge about the offender. Complete psychological, sexual and risk assessments are generally not conducted prior to the plea or disposition, the offender’s past offense history may be unknown and his amenability to treatment has not been established. Conversely, the knowledge gleaned from a[n] SVP evaluation generally provides significantly greater information from which a reasoned decision about offender management can be made. Prosecutors should be making efforts to get better evaluations conducted of offenders prior to disposition, rather than resting on the assurance that SVP statutes will act as a safety net to keep in the truly dangerous offenders.

Brian K. Holmgren, *Sexually Violent Predator Statutes—Implications for Prosecutors and Their Communities*, PROSECUTOR, May-June 1998, at 20, 29-30.

encourage trials for persons charged with a predicate sex offense.<sup>117</sup> The Act also may encourage prosecutors to seek convictions for predicate offenses.<sup>118</sup> In his concurrence in *Hendricks*, Justice Kennedy addressed this point specifically:

If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function. These concerns persist whether the civil confinement statute is put on the books before or after the offense. We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.

. . . If, however, civil confinement were to become a mechanism for retribution or general deterrence . . . our precedents would not suffice to validate it.<sup>119</sup>

### 3. "Punitive Looking" Policies

Committed persons may raise the very practical issue that civil commitment and traditional confinement look and feel the same. From their perspective, SVPs might ask: "If my cell and my privileges are the same as when I was in jail, what difference does it make that the guard is wearing a DMH uniform?" The *Hendricks* majority and dissent agreed that the civil authority of SVP acts makes the constitutional difference.<sup>120</sup> However, because a reviewing court will likely weigh all factors that look punitive, custodial agencies that adopt policies pursuant to the SVP Act should be wary of adopting "punitive looking" policies.

Two policy issues outside the SVP Act may raise an inference of pretext. First, the Edisto Unit has not been slated for licensing as a DMH hospital. A decision not to license the facility further distinguishes SVPs from traditionally committed persons and raises an inference of pretext similar to the amended definition of patient. Second, the current interagency agreement between DMH

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117. A predicate offense means the person has been "convicted of a sexually violent offense," which, under the SVP Act, includes guilty and nolo contendere pleas. S.C. CODE ANN. § 44-48-30(6)(a) (Law. Co-op. Supp. 1998).

118. *Id.* § 44-48-30(2) (incorporating 14 criminal sex offenses which may serve as a predicate offense).

119. *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring).

120. The majority wrote, "We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law." *Hendricks*, 521 U.S. at 365-66 (citing *Allen v. Illinois*, 478 U.S. 364, 373 (1986)). The dissent added, "Civil commitment of dangerous, mentally ill individuals by its very nature involves confinement and incapacitation. Yet 'civil commitment,' from a constitutional perspective, nonetheless remains civil." *Id.* at 380 (Breyer, J., dissenting) (citing *Allen*, 478 U.S. at 369-70).

and SCDC requires committed persons to follow SCDC personal property policies.<sup>121</sup> This provision raises a pretext by using SCDC rules to shape the daily lives of SVPs. If stricter standards are necessary for the proper administration of SVPs (such as monitoring their books, magazines, or television viewing), DMH could easily adopt its own “SVP Personal Property Policy” rather than implement the SCDC policies.

### *B. Treatment Challenges*<sup>122</sup>

The United States Supreme Court in *Hendricks* did not rule upon the standard of treatment a State must provide to a committed SVP. To a large degree, Kansas had to defend its system because it failed to have any treatment

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121. Interagency Agreement, *supra* note 108, at 4.

122. DMH was developing its treatment program as this Note was being written, drawing from the treatment programs of other states including Kansas, Wisconsin, Washington, and Minnesota. According to a September 1998 report by the Washington State Institute for Public Policy, Minnesota’s treatment program is considered one of the most comprehensive, housing 130 committed persons. See Lieb & Matson, *supra* note 40, at 22. A Minnesota program overview outlines the following general goals for its committed persons:

1. Accepting responsibility for sexual behavior without cognitive distortion.
2. Identification of sex offense behavior cycle and development of a relapse prevention program.
3. Development of victim empathy.
4. Development of sexual identity, sexual knowledge, and awareness of sexual arousal. Also, reduction in disordered sexual arousal.
5. Resolution of issues related to personal victimization and family dysfunction which interfere with progress in treatment.
6. Identification of cognitive distortions in interpersonal relationships.
7. Identification and appropriate expression of feelings.
8. Development of appropriate social relationships.
9. Completion of educational and vocational goals.
10. Identification of appropriate recreation and leisure activities.
11. Management of identified psychiatric disorders.
12. Chemical dependency treatment when indicated.

The Minnesota Sex Offender Program (undated) (on file with the *South Carolina Law Review*) (to request a copy contact Anita Schlank or Rick Harry at 1111 Highway 73, Moose Lake, MN 55767).

ready for its first committees, including Hendricks.<sup>123</sup> The majority was willing to excuse this, stating that “[a]lthough the treatment program initially offered Hendricks may have seemed somewhat meager, it must be remembered that he was the first person committed under the Act.”<sup>124</sup> The majority also noted that, “[w]hat is significant, however, is that Hendricks was placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals.”<sup>125</sup> The dissent found the Kansas statute had a punitive effect due to the lack of a treatment program for Hendricks,<sup>126</sup> the absence of mandatory treatment during the person’s criminal sentence,<sup>127</sup> and the lack of “less restrictive alternatives, such as postrelease supervision, halfway houses, or other methods.”<sup>128</sup>

As discussed above, the South Carolina SVP Act mandates that care and treatment conform to minimum constitution requirements.<sup>129</sup> Prior case law has shaped different standards for mental hospitals and for correctional institutions. One recent South Carolina Court of Appeals case stated the constitutional minimum for treatment in mental hospitals is “accepted standards of professional care.”<sup>130</sup> This subjective standard for mental hospitals is much higher in comparison to care required in correctional institutions. The Fourth Circuit Court of Appeals has interpreted the treatment standard for correctional institutions to be “adequate medical services.”<sup>131</sup> However, because the Edisto

123. “The court found that, as of the time of Hendricks’s commitment, the State had not funded treatment, it had not entered into treatment contracts, and it had little, if any, qualified treatment staff.” *Hendricks*, 521 U.S. at 384 (Breyer, J., dissenting) (citing *In re Hendricks*, 912 P.2d 129, 131, 136 (Kan. 1996)).

124. *Id.* at 367-68. The majority also noted that by the time the case had reached the United States Supreme Court, Kansas was providing its committed SVPs approximately 31.5 hours of treatment per week. *Id.* at 368 (citing Transcript of Oral Argument at 14-15).

125. *Id.* at 368. The Supreme Court’s footnote to this sentence reads:

We have explained that the States enjoy wide latitude in developing treatment regimens. In *Allen v. Illinois*, for example, we concluded that “the State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment.” By this measure, Kansas has doubtless satisfied its obligation to provide available treatment.

*Id.* at 368, n.4 (citations omitted).

126. *Id.* at 384 (Breyer, J., dissenting).

127. *See id.* at 385 (Breyer, J., dissenting).

128. *Id.* at 387 (Breyer, J., dissenting).

129. S.C. CODE ANN. § 44-48-170 (Law. Co-op. Supp. 1998); *see supra* note 93 and accompanying text.

130. *Bishop v. South Carolina Dep’t of Mental Health*, 323 S.C. 158, 162, 743 S.E.2d 814, 816 (Ct. App. 1996).

131. *Sweet v. South Carolina Dep’t of Corrections*, 529 F.2d 854, 864 (4th Cir. 1975).

Unit is not slated for licensing as a hospital and because committed SVPs are not “patients,” it is unclear what degree of care a court would impose when reviewing the sufficiency of treatment for committed SVPs. The question is further complicated by the ability of DMH to transfer control, care, and treatment to SCDC with an interagency agreement.

A federal district court reviewing Washington’s SVP Act applied the subjective mental health standard.<sup>132</sup> The court held that Washington made inadequate progress toward a comprehensive treatment program.<sup>133</sup> The court appointed a special master to oversee the program’s progress toward achieving the court-ordered conditions.<sup>134</sup>

### C. Procedural Concerns

Although SVP proceedings are civil, many criminal law protections are afforded the offender during the commitment process. The South Carolina SVP Act provides a basic framework for commitment procedure but leaves out many procedural details. Some of the questions left unanswered are: “Do civil or criminal discovery rules apply? Do the offender’s ‘rights of confrontation’ applicable in criminal cases apply and create additional burdens for the admission of hearsay evidence? . . . What limitations are placed on how experts or jurors may consider ‘prior conduct’ evidence?”<sup>135</sup> As more and more offenders are committed as SVPs, courts and lawyers must sort out these procedural details.

## V. CONCLUSION

Although modern SVP legislation boasts a relatively short-lived history, civil commitment of sexual offenders is not a novel approach to combating recidivist sex offenders. The sexual psychopathy laws of the past enjoyed immediate popularity but quickly lost favor with the legal community and with psychiatrists who had to predict “future dangerousness.” While modern SVP acts may have improved some of the shortfalls of the sexual psychopathy laws, some potential pitfalls remain. The most notable legal challenges ahead involve avoiding pretext for punishment and providing adequate, long term treatment.

The South Carolina legislature can improve the current SVP Act by amending the provisions that raise an inference of pretext, especially the amended definition of patient and the SCDC/DMH interagency agreement. Because treating these persons is an expressed goal of the SVP Act, the

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132. See Scott Matson & Roxanne Lieb, *Sexual Predator Commitment Laws*, 1997 WASH. ST. INST. FOR PUB. POL’Y 3 (citing Turay v. Weston, No. C91-664WD (W.D. Wash. June 6, 1994) (unpublished order and injunction)).

133. *Id.*

134. *Id.*

135. Holmgren, *supra* note 116, at 32.

legislature should consider raising the treatment standard above constitutional minimums. Additionally, the legislature should consider improving the law by requiring potential SVPs to be identified and treated while they are serving their criminal sentence.

Overall, South Carolina's SVP Act cannot cure the shortcomings of the correctional system nor prevent sex offenders from reoffending. However, if state agencies are properly resourced,<sup>136</sup> and if courts and lawyers judiciously implement the SVP Act to commit only the narrow group of mentally dysfunctional persons who pose a future risk to society, the Act can serve its preventative purpose of protecting future victims from recidivist sex offenders.

*J. Harper Cook*

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136. See Anna Clark, *Tab for Sex Predators Program in S.C. Skyrockets into Millions*, THE STATE (Columbia, S.C.), Mar. 14, 1999, at A1 (discussing a proposed budget increase for the SVP program from an initial \$140,000 to \$4 million).

